



Kote Building Construction Ltd (Suing as the Managing Director of Kote Building Construction Ltd) v County Government of Nairobi & 3 others (Miscellaneous Application E044 of 2025) [2025] KEHC 17110 (KLR) (Judicial Review) (19 November 2025) (Ruling)

Neutral citation: [2025] KEHC 17110 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E044 OF 2025
JM CHIGITI, J
NOVEMBER 19, 2025**

BETWEEN

**KOTE BUILDING CONSTRUCTION LTD APPLICANT
SUING AS THE MANAGING DIRECTOR OF KOTE BUILDING
CONSTRUCTION LTD**

AND

**COUNTY GOVERNMENT OF NAIROBI 1ST RESPONDENT
THE COUNTY SECRETARY, COUNTY GOVERNMENT OF
NAIROBI 2ND RESPONDENT
THE COUNTY EXECUTIVE COMMITTEE MEMBER FOR FINANCE,
NAIROBI CITY COUNTY 3RD RESPONDENT
THE CHIEF OFFICER, ROADS, PUBLIC WORKS AND TRANSPORT,
NAIROBI CITY COUNTY 4TH RESPONDENT**

RULING

1. The application that is before this court for determination is the Originating Motion dated 7th April, 2025 wherein The Applicant seeks orders that;
 1. ...Spent
 2. That this Honourable Court be pleased to grant leave to the Applicant to institute Judicial Review proceedings against the Respondents for an order of Mandamus, compelling the Respondents to process and effect payment of IPC No.02, the sum of Kshs. 14,470,973.06



being monies lawfully due and payable for the works properly performed, certified, and approved by the Respondents.

3. That the grant of leave do operate as a stay against any further administrative action by the Respondents that would adversely affect the Applicant's entitlement to payment for the certified works, pending the hearing and determination of the substantive Judicial Review proceedings.
 4. That the costs of this Application be provided for.
 5. That this Honourable Court grants such further or other orders as may be just and equitable in the circumstances.
2. The applicant argues that it was awarded Contract No. NCC/RPW&T/T/176/2016–2017 for the construction of the DOD Kayole Motorable Bridge (Matopeni).
 3. It is its case that the said contract was duly executed to the satisfaction of the Respondents.
 4. The Applicant argues that the works were completed in accordance with the contract. It argues that the work was inspected by the Respondents who verified, approved, and formally certified the work through Interim Payment Certificate No. 02, thereby crystallising the Respondents' obligation to pay the certified sum.
 5. It is the Applicant's contention that despite several written follow-ups and the submission of all required documentation, the Respondents have declined, without lawful justification, to process the payment, notwithstanding that the project had been budgeted for.
 6. The Applicant submits that such inaction constitutes a breach not only of its contractual rights but also of Article 47 of *the Constitution* and the *Fair Administrative Action Act*, 2015.
 7. The Applicant argues that the Respondents' refusal to settle the certified amount has caused significant financial prejudice, including inability to meet obligations to employees, suppliers, and financiers, thereby exposing it to penalties and the risk of third-party litigation.
 8. It buttresses its case on the case of Republic v Kenya National Examinations Council ex parte Gathenji & Others [1997] eKLR.
 9. It is urged that the Respondents, having certified completion of works and acknowledged the debt through IPC No. 02, are under a legal and administrative duty to process the payment.
 10. Reliance is further placed on several decisions including Republic v County Secretary, Nairobi City County & Another Ex Parte Wachira Nderitu Ngugi & Co. Advocates [2020] eKLR, Republic v Principal Secretary, Republic v County Secretary, County Government of Kisumu & 2 others and Republic v Kenya National Highway Authority Ex Parte Said Ahmed T/A Saico Contractors [2015] eKLR, which underscore that where a statutory or public duty to pay has arisen and has not been fulfilled, mandamus is the appropriate remedy.
 11. The Applicant has also responded to the Grounds of Opposition, submitting that judicial review is concerned with the legality of administrative conduct and does not presuppose the existence of a prior judgment.
 12. They invoke Republic v County Secretary, Nairobi City County & Another Ex Parte Wachira Nderitu Ngugi & Co. Advocates [2016] eKLR to argue that once a public duty to pay has crystallised through certification or statutory process, mandamus may issue even in the absence of a judgment.



13. The Applicant rejects claims of abuse of process or violation of Article 50, relying on Jotham Mulati Welamondi v Electoral Commission of Kenya [2002] eKLR and Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others [2014] eKLR to emphasise the proper role of judicial review in ensuring administrative accountability. In the end, the Applicant urges that the Respondents' refusal to pay the certified sum is unlawful, unreasonable, and inconsistent with Article 201 of the Constitution, and that this Court ought to grant the orders sought.

The Respondents' Case;

14. On the part of the Respondents, they oppose the Application on the basis that the Motion is fatally defective, bad in law, and amounts to an abuse of Court process.
15. They contend that the Application presupposes the existence of a judgment against them and improperly attempts to transform a private contractual dispute into a public law claim.
16. The Respondents argue that the Applicant's grievance is fundamentally a claim for breach of contract and therefore belongs in a civil court where issues of performance, breach, and entitlement to payment may be properly determined through oral and documentary evidence.
17. They submit that judicial review, with its limited and supervisory remit, is wholly unsuited for resolving contested factual questions inherent in contractual disputes.
18. The Respondents rely on the Court of Appeal's decision in Zakia Juma Construction Co Ltd vs Permanent Secretary Ministry of Roads & Public Works & Another (2007) eKLR, in which it was affirmed that judicial review cannot be invoked to enforce contractual rights unless expressly provided in the contract itself. In that case, the Court upheld the striking out of an Application seeking to enforce contractual obligations through judicial review, holding that such matters squarely belong in the realm of ordinary civil litigation.
19. The Respondents submit that the Applicant's reliance on judicial review offends this principle and collapses the essential distinction between private and public law.
20. The Respondents further rely on Republic v AG, Permanent Secretary Ministry of Livestock & Fisheries Ex Parte Rachael Mumbo Mbano and Prabhulal Gulabchand Shah v Attorney General & Erastus Gathoni Miano Civil Appeal No. 24 of 1985, reiterating that mandamus issues only where an Applicant demonstrates both a vested legal right and an imperative public duty resting on the Respondent.
21. They argue that the duty alleged here arising from Interim Payment Certificate No. 02 is purely contractual and not public in nature, and therefore incapable of enforcement through mandamus.
22. The Respondents insist that the proper remedies for the Applicant, if any, lie in damages, specific performance, or other relief available in a substantive civil suit.
23. Additionally, the Respondents contend that the proceedings violate Article 50 by seeking to circumvent the evidentiary safeguards of civil litigation.
24. They argue that contested issues such as whether the works were completed, whether payment is due, or whether contractual conditions were satisfied cannot be fairly adjudicated within the confines of judicial review.
25. To entertain the Application would prejudice their right to test evidence through cross-examination and would therefore undermine the principles of due process.



26. The Respondents urge the Court to find that this Court lacks jurisdiction in judicial review to grant the orders sought; and that the Application should accordingly be struck out or dismissed with costs.
- Analysis and determination;
- The issue for determination is whether or not the Application for leave to institute Judicial Review proceedings can be granted.
27. The court has looked at the fact that the Applicant argues that it was awarded Contract No. NCC/RPW&T/T/176/2016–2017 for the construction of the DOD Kayole Motorable Bridge (Matopeni).
28. It is the Applicant’s case that a contract was duly executed to the satisfaction of the Respondents.
29. The Applicant argued that the works were completed in accordance with the contract, inspected by the Respondents, verified, approved, and formally certified through Interim Payment Certificate No. 02, thereby crystallising the Respondents’ creating the obligation to pay the certified sum.
30. This court is in agreement with the Respondent that the Applicant’s grievance is fundamentally a claim for breach of contract. Such a claim belongs to a civil court which has the jurisdiction over issues of performance, breach, and entitlement to payment.
31. That court is best suited to adequately and properly determine such a dispute through oral and documentary evidence.
32. In the Court of Appeal’s decision in *Zakia Juma Construction Co Ltd vs Permanent Secretary Ministry of Roads & Public Works & Another* (2007) eKLR, it was affirmed that judicial review cannot be invoked to enforce contractual rights unless expressly provided in the contract itself. In that case, the Court upheld the striking out of an Application seeking to enforce contractual obligations through judicial review, holding that such matters squarely belong in the realm of ordinary civil litigation.
33. The Court of Appeal in *Barclays Bank of Kenya vs Pyritic Guards Limited* [2015] eKLR, confronted with a similar issue stated:

“It is also trite law that a point of law can be raised at any stage, even though not raised before the court of first instance. The Court can also on its own motion raise a point of law at any point and make a determination based on the same even where such point has not been canvassed by the parties. The learned judge did not therefore do anything outrageous by raising the issue of non-compliance with Regulation 79 of Table A of the *Companies Act* and acting on it.” (Emphasis added)

(37) It is, therefore a basic rule of procedure that jurisdiction must exist when the proceedings are initiated. Because the question of jurisdiction is so fundamental, a limitation on the authority of the court, it can be raised at any stage of the proceedings by any party or even by the court suo motu. As a matter of practice, this Court has a duty of jurisdictional inquiry to satisfy itself that it is properly seized of any matter before it.

(38) It is a settled legal proposition that conferment of jurisdiction is a legislative function and it can only be conferred by *the Constitution* or statute. It cannot be conferred by judicial craft. See *Samuel Kamau Macharia & Another v Kenya commercial Bank & 2 Others*, SC Application No. 2 of 2011; [2012] eKLR. Nor can parties, by consent confer on a court power it does not have.”



34. In Republic v Registrar of Companies & 2 others; Waterfront Outlet Limited (C.147966) (Interested Party); Waterfront Outlets Limited (CPR/2015/214503) (Exparte) (Miscellaneous Application E059 of 2022) [2023] KEHC 227 (KLR) (Judicial Review) (19 January 2023) (Ruling) the court held:-

“Suffice to note that even with the expanded scope of judicial review under the new constitutional dispensation, judicial review still remains a special jurisdiction that is majorly restricted to examination of whether an administrative decision conforms to the requirements of legality, rationality and procedural propriety. It is opportune to add that the judicial review process cannot be a substitute to statutorily provide for jurisdiction of other courts or bodies and the judicial review court cannot and should not assume jurisdiction where statute clearly places jurisdiction at the door of another court or body. To echo the words of the Supreme Court in Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others (supra), “ A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.” It is this court’s finding and I so hold that this court lacks the jurisdiction to determine this suit”

35. In Republic v Registrar of Companies & 5 others Exparte Midlands Company Limited [2019] eKLR the court held that;

“38. Secondly, there are alternative fora that are more appropriate to resolve the factual disputes raised in this Application, such as the Civil or Commercial Division of the High Court, where no restrictions or limitations exist as those that arise in judicial review”

36. Although the judicial review division of the High Court is a court with the status of the High Court under Article 165 of *the Constitution*, I take the humble view that the Commercial division of the High Court is best suited to hear this suit.

37. Section 11(1) of the *High Court (Organization and Administration) Act* provides that for purposes of promoting effectiveness and efficiency in the administration of justice and promoting judicial performance, the Chief Justice may, where the workload and the number of judges in a station permit, establish any of the following divisions—

- a. the Family and Children Division;
- b. the Commercial Division;
- c. the Admiralty Division;
- d. the Civil Division;
- e. the Criminal Division;
- f. the Constitutional and Human Rights Division;
- g. the Judicial Review Division; and
- h. any other division as the Chief Justice may, on the advice of the Principal Judge determine.



38. From the facts of the case as read alongside Section 11(1) of the High Court (Organization and Administration) Act, it is my considered view that the issues raised by the Applicant herein are contractual matters that would be best solved at the Commercial Division of the High Court.

Determination;

39. This court lacks jurisdiction to preside over this suit as a result of which the order sought cannot be granted.

40. The Supreme Court Case of Dickson Ngigi Ngugi v Commissioner of Lands S.C Petition No. 9 of 2019 [2019] eKLR stated;

(36) Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coram non judice and amounts to a nullity because, as Nyarangi, JA famously said in the locus classicus, Owners of the Motor Vessel “Lillian S” v Caltex Oil, (Kenya) Ltd [1989] KLR 1, “jurisdiction is everything. Without it, a court has no power to make one more step”.

Order;

This suit is hereby transferred to the High Commercial and Tax Division of the High Court.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER 2025.

.....

J. CHIGITI (SC)

JUDGE

